

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 488461 and
MERCHANT MARINER'S DOCUMENT 021 44 0855
Issued to: Gregg Hartley

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2194

Gregg Hartley

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 1 September 1978, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, suspended the above captioned license and document for one month on twelve months' probation upon finding Appellant guilty of negligence. The specification found proved alleged that while serving as operator aboard M/V BUCCANEER under authority of the captioned documents, on or about 0945, 9 August 1978, Appellant did operate BUCCANEER off Boothbay Harbor, Maine, in a manner to endanger life, limb and property in proceeding to pass close aboard at excessive speed the lobster boat SUZIE B, ME 2005A, endangering life, limb and property of Charles Brewer.

The hearing was held at Portland, Maine on 24 August 1978.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of one witness and three exhibits.

In defense, Appellant offered the testimony of one witness and an exhibit which was made a part of the record solely for use in mitigation if the charge were found proved.

At the conclusion of the hearing the Administrative Law Judge announced that he had found the charge and specification proved. Subsequently the Administrative Law Judge rendered a written decision finding Appellant guilty and suspending all documents issued to Appellant for one month on twelve months' probation.

The decision was served 7 September 1978. Appeal was timely filed on 2 October 1978.

FINDINGS OF FACT

M/V BUCCANEER, O.N. 521956, is a party fishing vessel of 400 horsepower, 51.8 feet in length, of 46 gross tons. Under the applicable statutes, the vessel may be operated by the holder of an ocean operator's license, or higher grade license. The vessel idles at 4 knots, cruises at 10-12 knots, and has a maximum speed of 14-15 knots.

On 9 August 1978 Appellant was operator of M/V BUCCANEER under the authority of his duly issued license and document. The vessel departed Boothbay Harbor, Maine at about 0815 with 30 to 45 passengers on board. William Campbell was serving as First Mate and Deckhand. His duties included keeping passengers clear of the area forward of the wheelhouse to afford the operator an unobstructed field of view.

SUSIE B, ME 2005A, is a 28 foot, open-cockpit lobster boat. At the date and time in question, the vessel was operated by Charles Brewer, who was engaged in handling traps with the aid of a fixed davit.

At approximately 0945, 9 August 1979. SUSIE B was drifting in a position about 300 yards, bearing 025 degrees true from Tumbler Island Buoy "8". At that time BUCCANEER passed close aboard SUSIE B, making about 10 knots, at a distance of 6 to 8 feet. The wake thrown by BUCCANEER was 3-4 feet high and caused SUSIE B to pitch and roll violently such that the operator was in danger of being hurled overboard. There was about 600 yards of good water between McKown and Spruce Points in the area of the incident, with no conflicting traffic or supervening conditions. No personal injury or property damage occurred as a result of the close passage.

Weather conditions at the time were clear and hot; wind and seas calm with excellent visibility; slack water was 0934 and the tide was flooding.

BASES OF APPEAL

This appeal has been taken from the order of the Administrative Law Judge. Appellant asserts that principles of elementary fairness and equitable estoppel compel a reversal of the finding of negligence. He founds this contention on the purported reliance by himself on statements by the investigating officer that the matter was of insufficient gravity to warrant retention of professional counsel.

APPEARANCE: Thompson, Willard & McNabOE, Portland, Maine by Paul G. Vielmetti, Esq.

OPINION

The facts of this case, as alleged and found proved, are not in dispute on this appeal. There is substantial evidence of a reliable and probative character to support the Administrative Law Judge's conclusion that on 9 August 1978 Appellant operated M/V BUCCANEER in a negligent manner as to endanger the life, limb and property of Charles Brewer by proceeding to pass close aboard the SUSIE B at excessive speed. 46 CFR 5.20-95(b).

It is manifest from the record on appeal that Appellant was accorded his full rights with respect to representation by counsel. The un rebutted testimony of the Investigating Officer demonstrates his adherence to the applicable regulations. TR-12. It is clear that Appellant was fully advised as to the possible outcome of the hearing and as to his rights, with emphasis on the right to counsel. TR-12, line 17-19. The Notice of Hearings, signed by Appellant, acknowledged his receipt of this advice. TR-11, line 20; Form CG-2639. Appellant does not contest this formal advice of his right, inter alia, to counsel. Memorandum On Appeal, at 2.

The Administrative Law Judge made specific inquiry as to whether Appellant desired representation, and advised him fully in regard to the scope of the right. TR-5, lines 19-26; TR-6 line 11-18. The possible consequences of a finding of the charge proved also were elaborated on the record for Appellant. TR-5. Appellant's waiver of his right to counsel was therefore with full knowledge of the right, and of the potential consequences of the hearing. Consequently it may not be argued that Appellant suffered a constitutional violation of his right to counsel. See Decisions on Appeal Nos. 2063, 1821, and 1802. In a previous decision, on facts akin to the instant situation it was noted:

.... Appellant had already been advised that the hearing could result even in the revocation of his document, along with intermediate effects.... If the advice had been unqualifiedly that the hearing would result in an "admonition," translated as a "written... wrist slapping," there would have been grounds for assertion of error. Since the terms "revoked" and "suspended" had been used already, the attempted explanation of what admonition meant cannot be seriously regarded as "misleading," so as to result in denial of due process. Decision on Appeal No. 1747 at 5.

Appellant's Affidavit reflects that any advice by the Investigating Officer followed a clear statement of potential consequences. Affidavit on Appeal, at 2, para. 6. I find unpersuasive the contentions of Appellant that he was orally advised that if the charges were proved a letter of warning was the "only thing that could happen." Indeed, in his brief Appellant alters the gist of the purported advice by stating that it was "[a]

letter of admonition which Appellant was led to believe would be the worst possible outcome in his case." Brief at 4. In any event, a warning letter was not a potential result. 46 CFR 5.05-15(a)(6); Decision on Appeal No. 1897.

The record before me reveals no prejudice to the Appellant as a result of his waiver of the right to counsel. The Administrative Law Judge was solicitous of Appellant's rights and insured that he understood the mechanics and significance of each step of the hearing as it proceeded. Absence of prejudice is fatal to Appellant's effort to invoke equitable estoppel. See, generally, Decision on Appeal No. 1746.

Assuming, without so deciding, that equitable estoppel were applicable against the agency generally, two points should be clearly recognized. As Appellant notes in his Brief, at 3, the doctrine has as two of its central elements lack of knowledge of the truth of the matter in question and action (or inaction) resulting in a change of position or status to his prejudice. As noted above, no prejudice has been shown in this case. It is also clear of record that Appellant - several times - was explicitly advised of the serious nature of the proceedings and the potential for revocation or suspension of his document and license. Under these circumstances, equitable estoppel would not suffice as against a private litigant or a government agency.

CONCLUSION

I find that in the present case the government established by competent evidence that Appellant was negligent in his operation of M/V BUCCANEER on 9 August 1978. Further, I find that Appellant was accorded due process of law with respect to his right to counsel before the Administrative Law Judge.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts, on 1 September 1978, is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D. C., this 26th day of March 1980.

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